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No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,

Petitioner,

v.

STATE WATER RESOURCES CONTROL BOARD, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether attorneys' fees are available under 42 U.S.C. § 1988 for administrative and other proceedings that are related to an action under 42 U.S.C. § 1983, when those proceedings are not required by statute or by court order?

2. Whether, if administrative or other collateral proceedings are conducted pursuant to a district court stay of the proceedings under 42 U.S.C. § 1983, attorneys' fees are allowable?

3. Whether attorneys' fees are available under 42 U.S.C. § 1988 for efforts expended in a district court Section 1983 action when the ultimate relief is formally obtained in collateral administrative or other proceedings?

PARTIES TO THE PROCEEDING

There are no petitioners or respondents in addition to those named in the caption and in footnote 1.

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No. _____

ROCK CREEK LIMITED PARTNERSHIP,

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PETITION FOR A WRIT OF CERTIORARI

Rock Creek Limited Partnership ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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[1] Additional Respondents are Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh and Eliseo V. Samaniego, who were the individual members of the State Water Resources Control Board at the relevant times.

No party herein is a corporation, and there is no parent company or subsidiary required to be listed herein under Supreme Court Rule 29.1.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a) is reported at 972 F.2d 274. The opinion of the United States District Court for the Eastern District of California is unreported (App. 13a).

JURISDICTION

The court of appeals entered its judgment on August 5, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988), provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

In *California v. FERC*, 495 U.S. 490 (1990), after district court proceedings in a Section 1983 action had been stayed pursuant to court order, Petitioner prevailed on the underlying

merits of this litigation.[2] This Court held that the Federal Energy Regulatory Commission ("FERC") had properly found that the State of California could not bar Petitioner from operating under the terms of its federal license. This case presents the question of whether attorneys' fees are available under Section 1988 for the fees incurred in connection with such administrative proceedings even though those proceedings were not mandated by either statute or court order.

The Underlying Litigation

The controversy underlying the attorneys' fee claim arose from Petitioner's construction and operation of a small-scale hydropower project pursuant to a license issued by FERC on April 29, 1983. The FERC license set forth various operating conditions for the project, including the "bypass flows" which would be required in order to protect the stream's fishery (*Order Issuing License (Major)*, 23 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 62,137 (1983)).[3] The plant was constructed, at a cost of over $4.5 million, to operate most efficiently at the bypass levels set in the FERC license. (Excerpts of Record filed with Ninth Circuit ("ER") Tab 44 ¶ 6; Supplemental Excerpts of Record filed with Ninth Circuit ("ES") 18).

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[2] The circumstances surrounding the project and its early licensing history are described in detail in the Ninth Circuit's opinion in *California ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743 (9th Cir. 1989), and this Court's affirmance of that decision at 495 U.S. 490 (1990). Only the facts pertinent to the attorneys' fees claim are set forth above.

[3] Bypass flows represent the amount of water which must remain in the streambed during project operation and which cannot be diverted for power generation.

After initially issuing water appropriation permits consistent with the FERC license, in 1986 the Respondent California State Water Resources Control Board (the "State Board") convened hearings to determine whether, in order to protect the stream's fishery, Petitioner should be ordered to provide substantially higher bypass flows than FERC had established. (App. 2a). When the State Board rejected Petitioner's objections to any impairment of its federal license, Petitioner petitioned FERC for a declaratory ruling that the state could not bar Petitioner from operating under its federal license. (App. 2a). In March 1987 FERC issued a declaratory order ruling that the attempted state regulation was invalid and requiring Petitioner to observe the federal bypass flow requirement. (*Order in Response to Request for Declaratory Order and Providing for Hearing*, 38 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,240 (1987)).

Although the State Board received a copy of the FERC declaratory order on March 16, 1987, three days later it issued Order 87-2, which was directly inconsistent with the FERC order and required Petitioner to observe bypass flow requirements as much as four times higher than FERC's. (ER Tab 39; ER Tab 41 ¶ 14; App. 2a-3a).

Two weeks later, on April 9, 1987, the Petitioner filed the civil action below against the State Board, raising claims, *inter alia*, under the civil rights laws, 42 U.S.C. § 1983. In the Section 1983 claim, the Petitioner alleged that Order 87-2 impaired the Petitioner's right to operate the project in accordance with its FERC license and the Federal Power Act, and constituted an unconstitutional taking of private property for public use. Petitioner sought to enjoin the State Board from enforcing Order 87-2 and from regulating, or asserting jurisdiction to regulate, project operations in a manner inconsistent with the FERC license. Petitioner also requested an award of reasonable attorneys' fees and costs under 42 U.S.C. § 1988. (ER Tab 1). Together with the complaint, Petitioner filed motions for a temporary restraining order and for a preliminary injunction,

seeking temporary relief against the enforcement of Order 87-2. (App. 3a)

Simultaneously with, or immediately after, the filing of this suit, the State Board moved to intervene in the Petitioner's FERC license proceeding, and for rehearing of the FERC declaratory order on the ground that FERC's assertion of exclusive authority to establish bypass flows was inconsistent with federal law. (ER Tab 41 ¶ 15; ES 93-4; *Order Denying Rehearing*, 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,198 (1987)). FERC granted intervention on April 28, 1987, and briefing of the merits proceeded thereafter. (ES 13).

Meanwhile, in the litigation below, the parties on April 16, 1987 stipulated, and the district court ordered, that Petitioner withdraw its motion for a temporary restraining order, and that the State Board refrain from enforcing Order 87-2 pending hearing on Petitioner's motion for a preliminary injunction. (ER Tab 11). The latter motion came for hearing on May 18, 1987. (Reporter's Transcript filed with Ninth Circuit ("Tr.") 1-22). The district court ruled that drought conditions (which precluded project operation under any bypass flow requirement) rendered a preliminary injunction unnecessary at that time, but invited Petitioner to reapply should conditions change and enforcement of Order 87-2 appear imminent. (Tr. 21). The court urged the parties to schedule summary judgment briefing of the merits for September 1987, in view of the likelihood that October would bring sufficient rain to make the project operable under the terms of the FERC license. *Id.* Pursuant to that suggestion, cross-motions for summary judgment on substantially all claims pleaded were fully briefed and were argued on September 18, 1987, but no decision was immediately forthcoming. (App. 4a).

On November 20, 1987, FERC denied the State Board's motion for rehearing of the declaratory order, and on December 21, 1987, the State Board petitioned the Court of Appeals for the Ninth Circuit for review of FERC's rulings.

(*Order Denying Rehearing*, 41 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,198 (1987); ES 135-41; *California v. FERC*, No. 87-7538 (9th Cir. June 6, 1989)).

The district court, which had still not ruled on the seven-month-old summary judgment motions, then indicated that it would stay the Section 1983 action if the state would agree to forego enforcement during the pendency of the FERC appeal. (ES 143). Accordingly, the State Board on April 14, 1988, wrote the district court as follows:

> 1. For the duration of the appeal in the *State of California v. Federal Energy Regulatory Commission*, 9th Circuit Docket No. 87-7538 action, the State Board agrees not to exercise its enforcement powers . . . against the [Petitioner] for any violation of the bypass flows set forth in the State Board's Water Right Order No. 87-2 for the protection of the fishery resources of Rock Creek.
>
> 2. The State Board agrees to the waiver of enforcement authority as described in paragraph 1 solely for the purpose of obtaining a stay of the trial court proceedings in this action and, thus, encouraging the prompt resolution of the [appellate proceeding].

(ES 143-44).

On April 22, 1988, the district court entered an order noting that the appellate proceeding "involves the same preemption issue raised by the instant action," and further noting that the "state has agreed to this waiver [of enforcement] for the sole purpose of obtaining a stay in the instant action." (ES 146-47). The court then vacated the cross-motions for summary judgment and ordered that all proceedings be stayed pending resolution of the appeal from the FERC order. (*Id.*)

On June 6, 1989, the Court of Appeals for the Ninth Circuit ruled in Petitioner's favor on the appeal. *California ex rel. State Water Resources Bd. v. FERC*, 877 F.2d 743 (9th Cir. 1989), *aff'd*, 495 U.S. 490 (1990). The State Board petitioned this Court for a writ of certiorari. (ER Tab 58). The parties stipulated in the action below to a continuation of the stay pending a decision on the petition for certiorari, noting that "[t]he nature of Supreme Court action on the State's petition will largely govern whether and to what extent the stay of proceedings in this case should be continued in effect after that time." (*Id.*)

This Court granted certiorari on December 4, 1989. 493 U.S. 991. On May 21, 1990, after briefing and argument, it held that the State Board had no authority to interfere with Petitioner's operation of the project at the bypass flow levels specified in the FERC license. This Court agreed that "allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would 'constitute a veto of the project that was approved and licensed by FERC.'" *California v. FERC*, 495 U.S. 490 (1990).

Following this Court's decision, the State Board at last abandoned its four-year effort to regulate the project, withdrew Order 87-2, and issued Order WR 90-10, which amended the project's water appropriation permits to conform with the bypass levels ordered by FERC. (ES 149-53).

On September 14, 1990, the district court granted the State Board's motion to dismiss the underlying case as moot, but retained jurisdiction to hear Petitioner's motion for an award of attorneys' fees. (ER Tabs 68, 69).

The Decisions Below on Petitioner's Fee Petition

After briefing, the motion for attorneys' fees was heard on January 22, 1991. (Tr. 70-76). The trial judge limited

Petitioner's presentation to whether "there [is] any causative relationship between this lawsuit and the result under which you were prevailing party in some other lawsuit." (Tr. 60). After allowing only a brief argument by Petitioner, the district court indicated that the parallel litigation in *California v. FERC* was "part of the same dispute, but it has nothing to do with this litigation." (Tr. 63). Ruling from the bench, the district court concluded that Petitioner was not a "prevailing party" within the meaning of 42 U.S.C § 1988, even though, concededly, "[Petitioner] has received the relief it sought in this case [i.e.,] the removal of the threat posed to [Petitioner's] federal rights by the California State Water Resources Control Board's order." (Tr. 64-65). On April 1, 1991, Petitioner appealed. (ER Tab 87).

On appeal, the Ninth Circuit bifurcated its consideration of the fee claim, addressing "that [part] relating to the activities before FERC, including the subsequent appeals" separately from "that [part] relating to efforts before the district court in this action." (App. 6a). With respect to the latter, the court observed that "[t]he Board did alter its conduct under the pressure of the lawsuit to the extent that Rock Creek did not need to obtain a preliminary injunction." (App. 12a). With respect to this portion of the fee application, the court remanded for further proceedings.[4]

With respect to the remainder of Petitioner's fee claim, the Ninth Circuit in effect affirmed the district court's decision to reject any fee award for "activities before FERC, including subsequent appeals." (App. 6a-10a). In denying fees for the administrative proceeding, the court of appeals expressly endorsed the district court's "causation" analysis, elaborating that "[w]hen [Petitioner] became aware of the Board's intransigent attitude

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[4] Despite its conclusion, the court simply remanded the fragment of the fee claim pertaining to "efforts in the Section 1983 action only," holding merely that "[i]t is possible that the [fees incurred in the] Section 1983 action [were] causally related to the practical outcome realized and the non-enforcement of the illegal [State Board] order." (App. 12a).

about its authority to override the FERC decision, it had at least two choices" -- "to attempt to get a definitive response from FERC," or "to proceed directly to court." (App. 9a, 10a). While acknowledging that Petitioner "cannot be faulted tactically for going to FERC first, as it did," and while further acknowledging that resort to FERC "became the vehicle for final resolution" only when "California intervened on behalf of the Board, and then appealed," the court of appeals nonetheless concluded that fees were unavailable since "[t]he two avenues open to [Petitioner had been] independent." (App. 9a). The court elaborated that the two avenues here simply were not sufficiently "interrelated and complementary," because "approach to FERC was not a condition precedent to [Petitioner's] entry to federal court," and because the FERC decision was not "required by . . . remand from the district court." (App. 7a-8a, 9a).

In so holding, the court of appeals was obliged to distinguish a line of decisions from this Court "sustain[ing] awards of attorneys' fees in administrative or state court proceedings outside the federal action itself." (App. 10a). Thus, the court noted that *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), in contrast to this case, involved a statute -- Title VII -- which contained statutory requirements for exhaustion of administrative remedies. (App. 7a, 9a). *Sullivan v. Hudson*, 490 U.S. 877 (1989), was viewed as not authoritative because the resort to administrative proceedings occurred pursuant to court order. (App. 7a-8a, 9a). *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), was said to be distinguishable on the ground that it involved administrative work which "was required before the party could succeed in federal court." (App. 8a-9a).

REASONS FOR GRANTING THE WRIT

This case involves a question of importance under a variety of federal fee-shifting statutes: whether attorneys' fees may be

awarded for closely related litigation which is required neither by statute nor by court order.

As discussed below, the decision of the Ninth Circuit conflicts directly with decisions of this Court over the past twelve years. Those cases hold that where, as here, collateral proceedings are intimately tied to resolution of the underlying litigation, and are necessary to the results Congress sought to promote through fee shifting, a fee award for work done in the collateral proceedings is required.[5]

The Ninth Circuit's decision, moreover, perpetuates a conflict among the circuits as to whether such fees for collateral proceedings may be recovered whenever the necessary "intimate tie" exists, or only when the administrative proceedings are required by statute or court order. Decisions of the First, Third and Seventh Circuits impose no requirement that the collateral proceedings be required by statute or court order, while the Ninth Circuit here and the Second, Fifth and Tenth Circuits hold that fees are recoverable only when there is a statutory exhaustion requirement or court order. The decision of the Ninth Circuit and other circuits following the same rule will severely discourage plaintiffs from voluntarily seeking resolution of their claims before administrative agencies or other alternative fora, and burden the federal courts with disputes that could more easily and expeditiously be resolved by an administrative agency or non-federal forum. The issue is important in a wide variety of federal litigation, and should be resolved by this Court.

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[5] The Federal Power Act clearly grants Petitioner rights enforceable under 42 U.S.C. § 1983. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989).

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The Ninth Circuit's decision is directly inconsistent with decisions of this Court.

This Court first considered the issue of recovery of attorneys' fees for collateral proceedings in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). In *Carey*, the plaintiff filed a charge with the Equal Employment Opportunity Commission, which was then forwarded to the New York State Division of Human Rights as required by § 706 of Title VII. 447 U.S. at 56-57. Although Title VII's period of "mandatory" federal deferral lasts only 60 days, plaintiff nonetheless pursued her state remedies over a three year period to a successful conclusion. *Id.* at 57-59, 62-64. During the pendency of these proceedings, plaintiff commenced a Title VII action in federal court. *Id.* at 58. Upon the conclusion of the state proceedings, all that then remained of plaintiff's federal action was her prayer for an award of attorneys' fees under Title VII's fee-shifting statute, a provision worded virtually identically to Section 1988. *Id.* at 59.

Carey held that Title VII's fee shifting statute *required* an award of fees for work performed in administrative and state court proceedings, without regard to the fact that the judgment on the merits of the employment discrimination claim actually had been obtained in the state administrative proceeding. 447 U.S. at 61-66, 68. *Carey* reasoned that "Congress's use of the broadly inclusive disjunctive phrase 'action or proceeding' [in the fee shifting provision] indicates an intent to subject the losing party to an award of attorney's fees and costs . . . for administrative proceedings"; and that that provision was clearly intended to "facilitate the bringing of discrimination complaints" so as to "vindicat[e] a policy 'of the highest priority.'" *Id.* at 61, 63 (citations omitted).

Furthermore, while *Carey* buttressed its holding with references to Title VII's "interrelated scheme" that "mandat[es]" initial resort to state remedies, the Court expressly noted that the period of mandatory deferral to state remedies lasted for only 60 days. 447 U.S. at 64-65. Nonetheless, the Court affirmed the award of fees for the entire three year state proceeding, which represented work consuming over eighty percent of the time Carey's counsel spent on the merits. *Id.* at 59, 68-70. Clearly, the compensation awarded in *Carey* included a great deal of work that was in no way "mandatory" when viewed by the standards applied by the Ninth Circuit below.

The Ninth Circuit, however, read *Carey* narrowly on the authority of *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985). In *Webb*, the plaintiff, a teacher alleging race discrimination, filed a Section 1983 action after five years of optional and unsuccessful litigation he had brought under state tenure law before a state administrative agency. 471 U.S. at 235-37. After the federal suit terminated in a consent order, plaintiff sought attorneys' fees under Section 1988 for the entire administrative action as well as for the two-year district court litigation. *Id.* at 237-38, 243. The Court affirmed denial of fees for the administrative proceeding, noting that the civil rights acts, unlike Title VII, do not expressly require initial pursuit of state remedies prior to bringing of federal court proceedings; and that, accordingly, "[b]ecause [42 U.S.C.] § 1983 stands as as an 'independent avenue of relief,'" the administrative proceeding "simply [did] not have the same integral function under § 1983 that state administrative proceedings have under Title VII." 471 U.S. at 240-41 (citation omitted). In *Webb*, however, the work left uncompensated wholly predated the filing of the federal civil rights action, and the proceedings were optional, totally unsuccessful, and brought to enforce state tenure rights rather than any right conferred by federal law. *Id.* at 236-37, 239, 241-43.

Moreover, even if *Webb* engendered lingering doubts about the continued applicability of fee shifting statutes to nonmandatory collateral litigation, the Ninth Circuit's reading of *Webb* simply cannot be reconciled with *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). In *Delaware Valley*, plaintiff brought suit under the Clean Air Act against the Commonwealth of Pennsylvania to require the Commonwealth to implement a vehicle emission inspection and maintenance program as required by the Act. A consent decree eventually was entered requiring the Commonwealth to establish an emissions program in ten counties and for the Pennsylvania Department of Transportation to seek legislation instituting a system under which the Commonwealth would contract with garage owners for the establishment of inspection stations. If the legislature failed to approve such a system, then the decree required the Department to promulgate regulations allowing the Commonwealth to certify a number of private garage facilities to perform the inspections. Implementation of the decree, however, proceeded less than smoothly, and plaintiffs participated in extensive post-decree litigation in various fora, for which they subsequently sought an award of attorneys' fees under the Clean Air Act's fee shifting provision. 478 U.S. at 549-53.

The Commonwealth challenged the district court's grant of fees, to the extent it pertained to what were alleged to be "only tangentially related state and federal administrative proceedings." 478 U.S. at 554. Specifically, fees had been awarded following entry of the decree for, *inter alia*, plaintiffs' monitoring of the defendant's performance of the decree; their submission of comments on proposed state regulations; their opposition to attempts by defendant during hearings before the Environmental Protection Agency to persuade that agency effectively to limit the reach of the consent decree; and their filing of an amicus brief in a collateral state proceeding brought by third parties challenging the State's right to enter into the consent decree. *Id.* at 550, 552-53. The Court affirmed the award of fees for all of this work.

None of the work at issue in *Delaware Valley* was required by statute or court order. 478 U.S. at 550, 552-53.[6] Indeed, nothing in the opinion suggests that the Court considered a statutory or judicial "mandate" as even a factor for consideration in deciding on a fee petition. Instead of adopting such a rigid and arbitrary test, the Court in *Delaware Valley* reasoned that, "[a]lthough it is true that the proceedings involved . . . were not 'judicial' in the sense that they did not occur in a courtroom or involve 'traditional' legal work such as examination of witnesses or selection of jurors for trial, the work done by counsel in these two phases was as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom which secured Delaware Valley's initial success." 478 U.S. at 558. This reasoning is as fully applicable to the present case as it was in *Delaware Valley*. Indeed, in construing the Clean Air Act's fee-shifting provision, *Delaware Valley* expressly relied on the virtually identical language and purposes of Section 1988. *Id.* at 559. The Ninth Circuit's decision is fundamentally at odds with *Delaware Valley*.

The Ninth Circuit's approach is inconsistent as well with *North Carolina Dep't of Transportation v. Crest Street Community Council, Inc.*, 479 U.S. 6, 15 (1986), in which the Court articulated a broad test for the allowance of attorneys' fees, observing that "[a] court hearing one of the civil rights claims covered by § 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation. See *Carey*, *supra* (so holding under identical language of Title VII)."

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[6] *See also Delaware Valley Citizens Council for Clean Air v. Pennsylvania*, 581 F. Supp. 1412, 1429 (E.D. Pa. 1984)(expressly noting that plaintiffs sought compensation for "activities their attorneys performed in state court litigation and in regulatory actions, such activities not directly required by this court's Orders").

Finally, the Ninth Circuit's decision is inconsistent with *Sullivan v. Hudson*, 490 U.S. 877 (1989), in which the Court synthesized the teachings of its fee shifting cases to articulate the appropriate standard for determining the applicability of fee shifting statutes to collateral litigation. In *Sullivan*, the Court concluded that attorneys' fees should be awarded to a social security claimant under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988), for legal services performed during an administrative remand. While the case thus involved a collateral proceeding that was "mandated" by court order, the Court's discussion of its precedents was not confined to such facts. Instead, this Court observed that "[o]ur past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." 490 U.S. at 888.

Certiorari should be granted to resolve the conflict between the decision below and this Court's decisions.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

Despite this Court's decisions approving recovery under fee shifting statutes for closely related litigation, a conflict has developed among the circuits as to the availability of fees where such proceedings are nonmandatory.

On the one hand, the position taken by the Ninth Circuit below -- that fees are not awardable absent statutory exhaustion requirements or a mandatory court order -- is shared by at least three other circuits. For example, the Tenth Circuit in *Manders v. Oklahoma ex rel. Dep't of Mental Health*, 875 F.2d 263 (10th Cir. 1989), held that fees could not be awarded under Title VII for relief obtained in an optional grievance procedure created by

state statute because those proceedings were not mandated by statute: "Whether employees pursue the internal grievance procedure or not, they at all times have the right to file their cases with the Oklahoma Human Rights Commission, the Equal Employment Opportunity Commission or the Ethics and Merit Commission. Thus, the procedure is an enforcement mechanism additional to, not a precondition of, Title VII enforcement, and is not an integral part of the Title VII scheme." 875 F.2d at 267. The Fifth Circuit in *Arriola v. Harville*, 781 F.2d 506 (5th Cir.), *cert. denied*, 479 U.S. 820 (1986), and the Second Circuit in *Gerena-Valentin v. Koch*, 739 F.2d 755 (2d Cir. 1984), applied essentially the same analysis with respect to the fee-shifting provision of the Voting Rights Act.[7] In *Arriola* and *Gerena-Valentin*, plaintiffs successfully sued to enjoin implementation of redistricting plans that had not been approved. The plaintiffs in both *Arriola* and *Gerena-Valentin* then participated in preclearance reviews before the Justice Department, seeking changes to be made in the localities' proposed plans. It was these efforts for which plaintiffs sought, unsuccessfully, to obtain an award of attorneys' fees under the Act. In denying fees, *Gerena-Valentin* distinguished *Carey* on the ground that in that case, "the plaintiff was required by statute to exhaust state and local administrative remedies before resorting to

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[7] The Voting Rights Act requires state and local governments to obtain federal governmental approval of any change in a previously approved election plan, through, *inter alia*, submission of the proposed changes to the Justice Department for "preclearance." 42 U.S.C. § 1973c (1988). Where a locality proposes to conduct an election pursuant to an unapproved plan, the Act permits institution of a civil action to enjoin implementation of the plan. *Id.* Attorneys' fees are available under the Act to prevailing parties, other than the United States, "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 42 U.S.C. § 1973*l*(e)(1988).

litigation." 739 F.2d at 761. *See also Arriola*, 781 F.2d at 510-11 n.3.[8]

On the other hand, the First, Third, and Seventh Circuits do not view the absence of a statutory exhaustion requirement or court order as barring attorneys' fees for closely-related litigation. Thus, in *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983), a Title VII class action, plaintiffs sought attorneys' fees for their efforts "in several court and administrative proceedings, involving the . . . Departments of Labor, Defense and the Interior," to have the defendant employer debarred from federal contracting under Executive Order 11246.[9] 670 F.2d at 763. Plaintiffs launched these efforts when the Title VII action stalled following the death of the district court judge. *Id.* The Seventh Circuit awarded fees for the debarment initiatives, specifically rejecting the contention that fees are available only for "mandatory procedures," and noting that "the issues and factual background were the same for both the Title VII action and the enforcement of Executive Order 11246." *Id.* at 766. *See also Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985) (following *Chrapliwy*).

Similarly, in *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984), the First Circuit determined that fees should be awarded under

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[8] *Arriola* and *Gerena-Valentin* both reserved the issue of whether fees are available for "services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and where that work is *required* and *necessary* to resolve the issues of the independent lawsuit." *Arriola*, 781 F.2d at 507 n.1 (emphasis added). *See also Gerena-Valentin*, 739 F.2d at 759.

[9] Executive Order 11246 prohibits federal contractors from discriminating against employees on the basis of race, sex, or other impermissible grounds. The contractor can be debarred from its contracts and declared ineligible for future contracts in the event of noncompliance with the Order. 670 F.2d at 763 n. 1.

Section 1988 in a sex discrimination case for work plaintiffs performed in defending a state declaratory judgment action brought by defendants under state antidiscrimination laws seeking a determination that defendants had not engaged in discrimination. The First Circuit noted that "[t]he issues in the state suit were virtually the same as in the federal case." 728 F.2d at 22. Once again, there was no statutory exhaustion requirement and no court order committing the litigants to the collateral forum. Instead, the court of appeals reasoned that fees should be awarded because of the virtual identity of the issues and because "plaintiffs were forced to defend [the state court suit] lest they lose their § 1983 claim in the federal courts through collateral estoppel." *Id.* Accordingly, the court of appeals concluded that "defense of the state court action was a necessary part of plaintiffs' efforts to achieve their § 1983 goal [since] [i]t formed part of an 'action . . . to enforce a provision of sections . . . 1983 [and] 1985 . . . .'" *Id.* (citation omitted).

The Third Circuit has also held that fees under Title VII should be awarded for work undertaken in a collateral proceeding -- an arbitration under the nondiscrimination provision of a collective bargaining agreement -- even though that proceeding involved "an enforcement mechanism additional to, and not required by, Title VII's enforcement scheme." *Sullivan v. Commonwealth of Pennsylvania Dep't of Labor and Indus.*, 663 F.2d 443, 447 (3d Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *Sullivan* stressed that "an award of attorneys' fees under [Title VII] and its companion provision, 42 U.S.C. § 1988, is not limited to the situation in which the plaintiff prevails by a judgment in the Title VII action itself, by a favorable resolution of state administrative proceedings, or by a judgment in any other civil rights action. Rather . . . attorneys' fees are available whenever a civil rights action ultimately results in the plaintiff's having obtained relief, even when there are several links in the chain of events connecting the claim brought and the relief granted." 663 F.2d at 447.

Finally, the Eighth Circuit's rulings are in hopeless conflict regarding the availability of fees for nonmandatory collateral proceedings. Some decisions affirm such fee awards. *Bobbitt v. Paramount Cap Mfg. Co.*, 942 F.2d 512, 514 (8th Cir. 1991)(Title VII action; fees awarded for work performed in unemployment benefits proceeding because this work was "useful and substituted for work at the judicial stage that would have been ordinarily necessary to a successful outcome of Bobbit's civil rights claim"); *McDonald v. Armontrout*, 860 F.2d 1456, 1462 (8th Cir. 1988)(class action challenging constitutionality of prison conditions; Section 1988 fees awardable for investigative work arising out of a previous habeas corpus proceeding, since the work "obviated the need for comparable work in" the civil rights proceeding, and since it "contributed directly to [the] successful outcome."); *see also Jenkins v. Missouri*, 862 F.2d 677 (8th Cir. 1988)(affirming an award of attorneys' fees under Section 1988 for plaintiffs' unsuccessful lobbying to obtain passage of tax increases to fund a school desegregation remedy, over the school district's objection that the district, and not the plaintiffs, had submitted the levy proposals to the voters; the fee claimants had "stood to benefit" from their lobbying and had "performed a valuable and not unexpected role" in the election).

In another case, however, the Eighth Circuit has concluded that fees are not available under Section 1988 for collateral litigation where there was no exhaustion requirement. *Quinn v. Missouri*, 891 F.2d 190 (8th Cir. 1989)(denying a motion for rehearing of a denial of an attorneys' fees award, in view of the lack of any exhaustion requirement, where (i) the Section 1983 plaintiffs challenged the constitutionality of a provision of the Missouri Constitution; (ii) defendants filed a declaratory judgment action in state court for construction of the provision; (iii) plaintiffs counterclaimed in the state court action, and litigated the issue successfully to this Court; and (iv) the federal district court was ordered to abstain and to dismiss the civil rights action).

These decisions reflect a deep division among the circuits regarding the proper interpretation of the Court's holdings concerning the availability of attorneys' fees for nonmandatory collateral proceedings. The conflict can only be resolved by this Court.[10]

III. THE PROPER APPLICATION OF SECTION 1988 TO COLLATERAL PROCEEDINGS IS AN IMPORTANT AND RECURRENT ISSUE

Many other fee-shifting statutes contain virtually identical wording to that in Section 1988. Section 1988 was patterned after the attorney's fees provisions in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1988), 42 U.S.C. § 2000e-5(k) (1988), *as amended* Pub.L. 102-166, 105 Stat. 1075 (1991). The wording of Section 1988 is also essentially identical to the Voting Rights Act attorneys' fee provision, 42 U.S.C. § 1973(*l*)(e) (1988). Several other attorneys' fees statutes, while not identical to Section 1988, contain wording that, for many purposes, is indistinguishable. These include, among others, the Equal Access to Justice Act, 28 U.S.C. § 2412(b) and (d) (1988); the Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (1988); and the Copyright Act, 17 U.S.C. § 505 (1988). Because of the similarity in wording and purpose, authorities construing these statutes are often used interchangeably.

Moreover, as shown above, the availability of fees for collateral proceedings has been a recurrent problem arising with respect to application of Section 1988 and other fee shifting

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[10] With respect to the fees incurred in district court, this case presents the additional question of whether a further hearing is necessary to establish that the district court proceeding "caused" the result in the administrative proceedings. For the same reason that the fees incurred in the administrative proceedings are allowable, no such causation inquiry is necessary or appropriate with respect to the fees incurred in district court.

statutes. The decision below would substantially undermine the right to attorneys' fees by making the forum for resolution of the dispute all-important in many cases. This emphasis on forum selection will also erode the many prudential policies courts have established favoring deferrals to the decision-making processes and judgments of other tribunals and arms of government, such as the doctrines of primary jurisdiction and abstention. This approach will also encourage plaintiffs to litigate claims in federal court that could be better resolved in alternative proceedings.

The erosion of the right to attorneys' fees would be particularly serious in the context of Section 1983. Section 1988 was specifically designed to encourage the bringing of meritorious civil rights claims. The statute's legislative history makes clear that the civil rights laws "depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908-10. Moreover, because many, if not most, civil rights cases involve only injunctive relief, a fee award takes on heightened importance as the only means to recoup the costs involved in pursuing the litigation. In this connection, the fee award often may serve as well as the only deterrent to governmental invasion of private civil rights.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 3, 1992

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCK CREEK LIMITED PARTNERSHIP, a California limited partnership,	)	No. 91-15538
	)	D.C. No.
	)	CV-87-00523-LKK
	)	OPINION
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STATE WATER RESOURCES CONTROL BOARD, *et al.*,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, Chief Judge, Presiding

Argued and Submitted
May 12, 1992 - San Francisco, California

Filed August 5, 1992

Before: Betty B. Fletcher, Cecil F. Poole, and
Thomas G. Nelson, Circuit Judges.
Opinion by Judge T.G. Nelson

OPINION

T.G. NELSON, Circuit Judge:

The California Water Resource Board (Board) imposed minimum flow conditions on a hydroelectric project inconsistent

with those contained in the project license issued by the Federal Energy Regulatory Commission (FERC). The position of the Board was rejected by this court in affirming a FERC declaratory order in *State of California, ex rel. State Water Resources Board v. FERC*, 877 F.2d 743 (9th Cir. 1989), and by the United States Supreme Court in *California v. FERC*, 495 U.S. 490 (1990). The project sponsor here appeals the district court's denial of an award of attorneys fees in its 42 U.S.C. § 1983 action filed shortly after the Board issued its order. We vacate the order and remand.

FACTS AND PROCEEDINGS BELOW

Rock Creek Limited Partnership (Rock Creek) is the project sponsor of a small hydroelectric project on Rock Creek, which is a tributary of the South Fork of the American River near Placerville, California. In April, 1983, Rock Creek received a FERC license, which established minimum flows past the project diversion of eleven cubic feet per second (cfs) May to September, and fifteen cfs October through April. The license permitted FERC to change the minimum flow following completion of long-term studies the licensee was to complete in conjunction with the California Department of Fish and Game.

In February, 1984, the Board issued a permit for the project with interim flows duplicating those of FERC. The permit reserved Board jurisdiction to set permanent flow rates after completion of the long-term studies. In 1986, the Board held hearings concerning the possible imposition of higher minimum flows, and rejected Rock Creek's objections based on its FERC license.

After the Board's rejection of Rock Creek's argument, Rock Creek filed a petition for declaratory order with FERC, seeking an order declaring that FERC's authority to set flow conditions at the project preempted the authority of the Board. In March, 1987, FERC issued an order as requested by Rock Creek, holding

that the Board "has no authority to set minimum flows for the project that conflict with those in the license. . . ." 38 FERC ¶ 61,244 (1987).

A few days after Rock Creek's receipt of the FERC order, the Board issued its Order No. WR 87-2, which set permanent flows of sixty cfs from March through June and thirty cfs July through February. The State of California then intervened in the FERC proceedings on behalf of the Board, challenging FERC's declaratory order. The result was a final FERC order rejecting California's position, which was affirmed on appeal to this court in *State of California ex rel. Water Resources Board v. FERC,* 877 F.2d at 750. The Supreme Court of the United States granted certiorari and affirmed in *California v. FERC,* 495 U.S. at 496.

In April, 1987, shortly after the Board issued Order No. 87-2, and contemporaneously with California's intervention at FERC, Rock Creek filed this action in the federal district court under 42 U.S.C. § 1983. Rock Creek sought to enjoin the Board from enforcing Order No. 87-2 and from regulating or asserting jurisdiction to regulate project operations or from interfering with the project's use of water rights for the project. The complaint included a request for attorneys fees pursuant to 42 U.S.C. § 1988. At the same time it filed the complaint, Rock Creek asked for a temporary restraining order and preliminary injunction against enforcement of Order No. 87-2.

The parties stipulated, and the district court ordered, that upon withdrawal of Rock Creek's motion for a temporary restraining order, the Board would refrain from enforcing Order No. 87-2, pending a hearing on the motion for preliminary injunction. Following hearing on that motion in May, 1987, the district court ruled that low flow conditions due to drought, which precluded project operation no matter what the minimum flow requirement was, rendered a preliminary injunction unnecessary. The court urged the parties to schedule a summary judgment hearing on the merits for September, 1987, in view of the potential for sufficient

rain to permit operation of the project. Cross-motions for summary judgment were briefed and argued on September 18, 1987. As part of the summary judgment proceedings, the parties stipulated that Order No. 87-2 was in effect and subject to enforcement.

The district court did not rule on the motions for summary judgment, but at a status conference in April, 1988, asked whether the Board would consider waiving enforcement actions against Rock Creek for failure to comply with the state mandated flows. Counsel for the Board stated in a letter to the district court:

> 1. For the duration of the appeal in the *State of California v. Federal Energy Regulatory Commission*, 9th Circuit Docket No. 87-7538, action, the State Board agrees not to exercise its enforcement powers . . . against the [project] for any violation of the bypass flow set forth in the State Board's water right Order No. 87-2 for the protection of the fishery resources of Rock Creek.
>
> 2. The State Board agrees to the waiver of enforcement authority as described in paragraph 1 solely for the purpose of obtaining a stay of the trial court proceedings in this action and, thus, encouraging prompt resolution of the . . . 9th Circuit action.

On April 22, 1988, the district court entered an order which noted that the appellate proceeding in the Ninth Circuit involved the same preemption issue raised by the action then pending in the district court, vacated the submission of the cross-motions for summary judgment and all stayed proceedings pending resolution of the appeal.

Following the 1989 decision of this court, the parties stipulated to continuation of the stay pending a decision on California's Petition for Certiorari in the United States Supreme Court. Following the Supreme Court decision, the Board issued Order

No. WR 90-10 which amended the project's water appropriation permits to conform with the bypass levels finally adopted by FERC.

In September, 1990, the district court granted the Board's motion to dismiss the case, but retained jurisdiction to hear Rock Creek's motion for an award of attorneys fees for its efforts in the FERC proceeding and in the district court. After briefing, the motion was heard in January, 1991, and the district court held that Rock Creek was not a prevailing party within the meaning of 42 U.S.C. § 1988.

> Although [Rock Creek] has received the relief it sought in this case, there is no causal link between this litigation and the relief. [Rock Creek's] goal when commencing this action was the removal of the threat posed to [Rock Creek's] federal rights by the California State Water Resources Control Board's order. This goal was achieved when the Board withdrew its order pursuant to the Supreme Court's ruling in *California v. FERC*, [495] U.S. [490], 110 S. Ct. 2024, 109 L.Ed. 474 (1990). This Court finds that the litigation in this Court has no causal relationship to the court's decision in *California v. FERC*, or the invalidation of the Board's order.

Rock Creek perfected a timely appeal to this court, contending that it was, in fact, a prevailing party and entitled to attorneys fees.

DISCUSSION

[1] Awards of attorneys fees pursuant to 42 U.S.C. § 1988 are reviewed for abuse of discretion, but any elements of legal analysis and statutory interpretation which figure in the district court's decision, and the legal standards applied by the district court, are subject to *de novo* review. *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991); *Carson-Truckee Water Conservancy Dist. v. Secretary of the Interior*, 748 F.2d

523, 524 (9th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985). A final determination favoring the plaintiff is not a precondition for a fee award under Section 1988. *Mather v. Gagne*, 448 U.S. 122, 129 (1980). However, the party seeking fees must establish that the party's lawsuit acted as a catalyst which prompted defendants to take action. *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187 (9th Cir. 1981); *Braafladt v. Bd. of Governors*, 778 F.2d 1442, 1444 (9th Cir. 1985). The moving party has the burden of establishing some sort of clear, *causal relationship* between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983) (quoting *Am. Constitutional Party*, 650 F.2d at 188) (emphasis in original).

In *Sablan v. Department of Finance*, 856 F.2d 1317 (9th Cir. 1988), we established a two-part test:

> First, we must determine what Sablan sought to accomplish in bringing his lawsuit and then determine whether the lawsuit was casually linked to the relief actually obtained. Second, there must be a legal basis for the Sablan's claim - it must not be "frivolous, unreasonable, or groundless."

856 F.2d at 1325 (internal citations omitted). As to the causation prong of the test, we said it was "nothing more than inquiry into factual causation." *Id.*

The Rock Creek attorneys fees claim has two parts: that relating to the activities before FERC, including the subsequent appeals, and that relating to efforts before the district court in this action. We will address the two parts separately.

A. The Administrative Proceedings.

As pointed out above, Rock Creek filed its petition for declaratory order with FERC after it became apparent that the Board was not accepting FERC's authority as exclusive. When

California intervened in that case, the FERC proceeding became the forum in which the battle on the merits was fought.

Rock Creek relies on four United States Supreme Court cases and a Ninth Circuit case in support of its contention that attorneys fees may be awarded under Section 1988 for work before an administrative agency or state court outside the Section 1983 action itself. However, each of those cases is distinguishable.

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), involved a claim for attorneys fees for appearances in state administrative and judicial forums in an action for employment discrimination under Title VII of the Civil Rights Act of 1964. The Court noted the interrelated and complementary nature of the state and federal enforcement efforts. It then said:

> Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.

Id. at 65. The FERC proceeding and the Section 1983 action were not interrelated and complementary, in the sense of the Title VII remedies discussed in *New York Gaslight Club*.

North Carolina Department of Transportation v. Crest St. Council, 479 U.S. 6 (1986), held that attorneys fees could not be awarded in an action brought solely to obtain attorneys fees for enforcement activities in other forums. Rock Creek's action in district court had purposes other than obtaining an award of attorneys fees so *Crest* is of no help to us here.

Sullivan v. Hudson, 490 U.S. 877 (1989), involved an award of attorneys fees to a social security claimant under the Equal Access to Justice Act, 28 U.S.C. § 2412, for legal services rendered in administrative proceedings following a remand to the agency from the district court. The court noted that "administrative proceedings may be so intimately connected with judicial proceedings as to be considered part of the 'civil action'

for purposes of a fee award." *Id.* at 892. The administrative proceedings there were required by the remand from the district court, unlike those here.

Rock Creek cites *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), for its holding that attorneys fees could be awarded for administrative proceedings claimed to be "tangential" but which had been "crucial" to the Clean Air Act litigation and which was "as necessary to the attainment of adequate relief for their client as was all of their earlier work in the courtroom." *Id.* at 558. The *Delaware Valley* case involved a complex series of judicial and administrative proceedings, all of which related to an action filed in federal court to compel Pennsylvania to comply with federal law. Even though part of the effort undertaken was in an administrative forum, it was all directly related to the purpose of the suit.

The Ninth Circuit case of *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982), cited by Rock Creek, does not resolve the issue presented, either. After inmates in the Oregon State penal system filed their action under Section 1983, the action was stayed by agreement while the inmates pursued a separate state court action seeking a declaration of state law which could have mooted the federal action. The trip to the Oregon courts resulted in a decision in favor of the state. Because the case was not mooted in state court, it returned to district court where the inmates received some of the relief requested. This court upheld an award of attorneys fees under Section 1988 which included fees for the work in state court. As the court noted, the state court action was filed *after* the federal action was commenced, and at the insistence of the state. The state proceedings, therefore, were an integral part of the overall effort to resolve the inmates' claims, and was pursued solely because of the filing of the federal action. *Id.* at 912.

In *Bartholomew*, the state action was a necessary step before the prevailing party could succeed. Likewise, in *Delaware Valley*, the administrative work was required before the party

could succeed in federal court. Here, however, Rock Creek was not faced with mandatory administrative action before it could prevail.

[2] When Rock Creek became aware of the Board's intransigent attitude about its authority to override the FERC decision, it had at least two choices. One was to attempt to get a definitive response from FERC, in order to buttress a later trip to court. When California intervened on behalf of the Board, and then appealed, this became the vehicle for final resolution on the merits.

[3] The other choice Rock Creek had was to proceed directly to court, and obtain an interpretation of FERC's authority without the benefit of a FERC opinion directly on the issue. While this would have been an appropriate course for Rock Creek to follow, it cannot be faulted tactically for going to FERC first, as it did.

[4] The two avenues open to Rock Creek were independent. Either could have resulted in a decision on the question of FERC's exclusive authority. An approach to FERC was not a condition precedent to its entry to federal court, as in *New York Gaslight Club*. Nor was the FERC decision rendered as a part of a continuing federal court action, as was the case in *Sullivan v. Hudson*. The distinct nature of the two proceedings distinguishes them from the related and dependent proceedings involved in the cases relied on by Rock Creek.

[5] The FERC proceedings resemble more closely the administrative efforts seeking relief for a teacher which were held not to carry a right to attorneys fees for a successful Section 1983 plaintiff:

> Because § 1983 stands as an independent avenue of relief and petitioner could go straight to court to assert it, the School Board proceedings in this case simply do not have the same

> integral function under § 1983 that state administrative proceedings have under Title VII.

Webb v. Dyer County Bd. of Educ., 471 U.S. 234, 241 (1985) (internal punctuation and citations omitted). *Cf., Smith v. Robinson*, 468 U.S. 992, 1011 n. 14 (1984) ("nothing in § 1983 requires that a plaintiff exhaust his administrative remedies before bringing a § 1983 suit"). The FERC action lacked the "intimate connection" which sustains awards of attorneys fees in administrative or state court proceedings outside the federal action itself. Therefore, Rock Creek's claim for attorneys fees for its efforts before FERC must fail.

B. The Action in Federal Court.

[6] The district court's order denying attorneys fees focused entirely on the lack of causal connection between the FERC decision and the Supreme Court's decision in *California v. FERC*. We agree with that analysis as to the FERC proceedings and subsequent appeals.

[7] However, we believe the district court failed to take into account the other aspects of the Section 1983 action. Rock Creek sought more than a decision on the merits: it also sought a temporary restraining order and preliminary injunction pending a final decision. This was relief not available to it in the FERC proceeding.

In *Texas Teachers v. Garland School District*, 489 U.S. 782 (1989), the Court specifically rejected the "central issue" test for prevailing party status, reiterating the standard set out earlier: plaintiffs may be considered prevailing parties "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Id.* at 789 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The *Texas Teachers* court also noted that:

> A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.

489 U.S. at 791.

In a declaration filed in support of Rock Creek's application for preliminary injunction, counsel for Rock Creek stated that he had called counsel for the Board and stated that if the Board would agree not to commence enforcement proceedings "in a fashion contrary to whatever declaratory relief this court may grant," Rock Creek would withdraw its requests for injunctive relief. "I indicated to Mr. Lee [counsel for the Board] that such an agreement would provide the Partnership with reasonable assurance the relief that it obtains will be effective while avoiding unnecessary injunctive dictates to the State Water Board." He went on to state that in a later conversation with counsel for the Board, he was informed the Board had decided to decline the proposal. The Board did not contradict these statements by Rock Creek's counsel.

The Section 1983 action filed by Rock Creek did not result in a holding that Board had acted in excess of its jurisdiction. That holding came in the administrative proceedings, ultimately affirmed in a decision by the Supreme Court. Therefore, on the merits of Rock Creek's arguments with the Board, this case did not affect or accomplish the result Rock Creek desired. However, Rock Creek also asked for a temporary restraining order and preliminary injunction in its complaint and ultimately pursued both. The FERC proceedings involved a challenge to an order entered by FERC and were not a challenge to the Board's order, which was only collaterally involved. Thus, Rock Creek needed relief in some other forum.

[8] The relief Rock Creek gained in the district court was in effect an informal stay both of the district court proceedings and the Board's threatened enforcement proceedings. The Board had declined Rock Creek's invitation to do by agreement external to

the litigation what later became a condition of the stay, namely, that the Board would not enforce its illegal order.

[9] In this situation, we think the district court focused too narrowly on Rock Creek's failure to obtain relief on the merits in the Section 1983 action. While the district court did not itself enter a stay, it was the pendency of this action in the district court which gave Rock Creek a vehicle by which to obtain a non-enforcement agreement by the Board. The Board did alter its conduct under the pressure of the lawsuit to the extent that Rock Creek did not need to obtain a formal preliminary injunction. It is possible that the Section 1983 action was causally related to the practical outcome realized and the non-enforcement of the illegal order.

Therefore, based on the foregoing analysis, we believe the district court erred in denying attorneys fees to Rock Creek on the basis asserted and the judgment should be vacated and the case remanded for the purpose of reconsideration of Rock Creek's motion for attorneys fees for its efforts in the Section 1983 action only.[1] The attorneys fees decision is committed to the district court's discretion and we express no opinion as to the ultimate outcome. Rock Creek's request for attorneys fees for pursuing this appeal is referred to the district court. If the district court, awards fees for Rock Creek's efforts in the district court, it shall fix and award fees to Rock Creek for this appeal.

VACATED AND REMANDED. Costs to appellant.

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[1] Since the district court decided the motion for fees on a causation analysis, it did not have occasion to reach the other prong of the *Sablan* test: Whether there was a legal basis for Rock Creek's case, *i.e.*, "it must not be frivolous, unreasonable, or groundless." *Sablan*, 856 F.2d at 1325. That issue is still open on remand.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROCK CREEK LIMITED PARTNERSHIP, a California limited partnership,	)	CASE NO. S-87-0523-LKK
Plaintiff,	)	ORDER DENYING THE PLAINTIFF'S MOTION ATTORNEYS' FEES
STATE WATER RESOURCES CONTROL BOARD, etc., et al.,	)	Date: Jan. 22, 1991 Time: 10:00 a.m.
Defendants.	)	Place: The Honorable Lawrence K. Karlton

On January 22, 1991 this Court heard plaintiff's motion for attorneys' fees. Appearing as counsel for the State defendants State Water Resources Control Board and the individual State defendants were Deputy Attorney General Clifford T. Lee and State Water Resources Control Board staff counsel Barbara Leidigh. Appearing as counsel for plaintiff Rock Creek Limited Partnership was Louis Touton. Upon conclusion of oral argument, the Court announced that it was denying the plaintiff's motion and set forth the reasons for its denial for the record. The Court further ordered the State defendants to prepare a formal order consistent with the record. After full consideration of moving and responding papers, all supporting papers and exhibits, and oral argument, the Court denies the plaintiff's motion for attorneys fees for the following reasons:

1. Under 42 U.S.C. Section 1988, this Court may only award attorney's fees to the "prevailing party." 42 U.S.C., § 1988 (Supp. 1990).

2. A party can demonstrate prevailing party status by establishing a "clear causal relationship between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir. 1983).

3. Whether a clear causal relationship exists involves two inquiries:

a) The Court must determine what the plaintiff sought to accomplish in bringing the lawsuit and then must determine whether the lawsuit was causally linked to the relief actually sought; and

b) There must be a legal basis for the plaintiff's claim. *Sablan v. Dept. of Finance of North Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988).

4. Although the plaintiff has received the relief it sought in this case, there is no causal link between this litigation and the relief. The plaintiff's goal when commencing this action was the removal of the threat posed to its federal rights by the California State Water Resources Control Board's order. This goal was achieved when the Board withdrew its order pursuant to the Supreme Court's ruling in *California v. FERC*, ____ U.S. ____, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990). This Court finds that the litigation in this Court has no causal relationship to the court's decision in *California v. FERC*, or the invalidation of the Board's order.

5. Because no causal relationship exists between this district court action and the invalidation of the Board's order, plaintiff Rock Creek Limited Partnership is not a prevailing party within the meaning of 42 U.S.C. Section 1988 for the purposes of this action. 42 U.S.C., § 1988 (Supp. 1990)

In light of the above reasons, the plaintiff's motion for attorney's fees is DENIED.

IT IS SO ORDERED.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON, CHIEF
JUDGE EMERITUS
UNITED STATES DISTRICT COURT

ORDER DENYING THE PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES